(5)

No. 87-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR J. BLANCHARD,

Petitioner,

v.

JAMES BERGERON, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN SUPPORT OF PETITIONER FOR AMICI CURIAE FARNSWORTH, SAPERSTEIN & SELIGMAN, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, CENTER FOR LAW IN THE PUBLIC INTEREST, CALIFORNIA TRIAL LAWYERS' ASSOCIATION, EQUAL RIGHTS ADVOCATES

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QUESTIONS PRESENTED

Should statutory awards of attorney's fees be calculated under the congressionally sanctioned lodestar/multiplier approach and not limited by the terms of a private contract between a civil rights plaintiff and his or her counsel?

Should the courts follow the practice in the private marketplace and compensate counsel for time spent by paralegals and law clerks in order to encourage economical and efficient staffing of civil rights cases?

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INTEREST OF AMICI CURIAE[1]

Amici Curiae represent an array of public interest, civil rights and trial lawyers' organizations who are dependent on statutory awards of attorney's fees in order to pursue their civil rights and public interest litigation. Taken together, amici have

[1] The parties have consented to the filing of this brief, and their letters of consent will be filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

litigated hundreds of attorney's fees applications in precedent setting public interest and civil rights cases. The amici are:

Farnsworth, Saperstein & Seligman, P.C., Oakland, California

This sixteen year old, sixteen-lawyer firm specializes in plaintiffs' employment discrimination litigation, both individual and class actions. The firm employs seven full time paralegals. Compensation in all class action and most individual litigation is based upon statutory awards of attorney's fees because plaintiffs usually lack the resources to pay the firm during litigation. Contingent fee agreements with individual clients frequently require no payment during the course of the litigation.

The firm regularly uses paralegals to increase its efficiency and thousands of paralegal hours are expended in the firm's Title VII class action cases. The firm's paralegals perform critical tasks such as shepardizing briefs, locating and interviewing class members and witnesses, summarizing testimony and depositions and indexing and managing documents. These tasks previously were handled by legal associates.

In addition to representing themselves in their own civil rights attorney's fees litigation, the firm represents many non-profit organizations and private practitioners in their attorney's fees litigation. In the course of attorney's fees litigation the firm has gathered evidence on how the prevailing legal market in Northern California bills for paralegal and law clerk time. All attorneys deposed on this issue have testified that they bill on an hourly rate basis for paralegal and law clerk time.

Mexican American Legal Defense and Educational Fund

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. MALDEF, like other civil rights organizations relies on court awards of attorney's fees as a means of

providing legal services to Hispanics whose civil rights have been denied. With offices throughout the West and Southwest, MALDEF regularly handles intake and referral of civil rights cases, which are exceedingly difficult to refer to private counsel on a contingent fee basis.

MALDEF has an extensive voting rights and employment discrimination litigation docket and regularly makes use of paralegals and law clerks to perform research and factual investigation.

Center for Law in the Public Interest, Los Angeles, California

The Center for Law in the Public Interest (CLIPI) is a non-profit public interest law firm. Although initially funded by foundation grants, over the years the Center's primary funding source has become court awarded attorney's fees which are used to fund the Center's public interest litigation which includes employment discrimination and environmental cases. Attorneys, who had previously worked in large Los Angeles law firms, founded the Center. These attorneys utilize paralegals extensively in the same way they did while working in the private sector.

California Trial Lawyers' Association

The California Trial Lawyers' Association (CTLA) is a statewide organization of plaintiffs' trial attorneys. CTLA's approximately 6,000 attorney members derive legal fees from contingency fee cases and from court awarded statutory fees. CTLA's members make extensive use of paralegals, particularly to assist in large scale massive document cases such as complex business and tort litigation.

Equal Rights Advocates, Inc., San Francisco California

Equal Rights Advocates, Inc. (ERA) is a non-profit public interest law firm dedicated to achieving equality of rights under

the law for women. ERA litigates a number of sex discrimination cases under Title VII of the Civil Rights Act of 1964, and uses paralegals and law clerks to staff cases in the most economical manner possible.

SUMMARY OF ARGUMENT

The amici submitting this brief are private practitioners and non-profit public interest organizations that are litigating hundreds of civil rights cases. Unless fee awards are available at market rates, the congressional goal of enabling clients to find competent lawyers needed to enforce civil rights legislation will be frustrated. The already severely diminishing number of attorneys willing or able to handle such cases would decrease even further. The contents of fee agreements are already subject to regulation under state statutes and are often restricted by state and local bar association rules. Regulation of fee contracts by the federal courts is not contemplated by the legislative history of Title VII's attorney's fee provision, 42 U.S.C. §§ 2000e-5(a), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, and is not necessary.

For amici, it is important to conserve their limited financial resources by staffing cases in the most economical and efficient manner possible. This can require extensive use of paralegal and law clerk time. Private practitioners routinely bill such time to fee paying clients and such marketplace practices are incorporated by the decisions of this Court. The efficient and economical delivery of legal services is supported by encompassing the use of paralegals. Refusal to award rates prevailing in the legal marketplace for such services would discourage their use by civil rights attorneys and create a dual bar—one which bills a market rate for paralegals, and the other which can only recover costs for such services.

ARGUMENT

I. A REASONABLE ATTORNEY'S FEE SHOULD BE CALCULATED UNDER THE LODESTAR/MULTIPLIER APPROACH AND NOT LIMITED BY THE TERMS OF A PRIVATE CONTRACT

The legislative history of 42 USC § 1988 establishes that the amount or terms of a contingent fee contract does not limit the calculation of a reasonable statutory fee. In addition, the recent attorney's fees decisions of this Court establish two principles relevant to the fee contract issue. First, fees must be sufficient to attract competent counsel to accept meritorious civil rights cases. Second, fees must not be calculated in a manner that yields arbitrary or capricious results. The use of the private fee contract as a cap violates both of these important principles.

A. A Private Fee Contract Does Not Limit The Calculation Of A Statutory Fee

It is firmly established that the proper method for calculating a "reasonable attorney's fee" is the lodestar/multiplier approach.[2] The legislative history of the Civil Rights Attorney's Fees Awards Act evidences Congress' clear intent to exclude from the statutory fee calculation the terms of the private fee arrangement.

The twelve factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are identified by Congress as the "appropriate standards" for a civil rights fee award.[3] Significantly, the Court in *Johnson* specifically rejected the interpretation of the Fifth Circuit in this case and stated that whether or not a client "agreed to pay a fee and in what amount is not decisive."[4]

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[2] *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (1983); *Blum v. Stenson*, 465 U.S. 886, 897 (1984).

[3] *Blum v. Stenson*, 465 U.S. 886, 893-4 (1984) (quoting with approval (S. Rep. No. 94-1011, p. 6 (1976), U.S. Code Cong. Admin. News 1976, pp. 5908, 5913.)

[4] *Id.* at 718 (quoting with approval from *Clark v. American Marine Corp.*, 320 F.Supp. 709, 711 (E.D. La.), *aff'd*, 437 F.2d 959 (5th Cir. 1971).

Congress' intent to exclude the fee agreement with counsel from the calculation of a reasonable statutory fee is also clear from an examination of the three cases where the fees standards were "correctly applied." *Blum, supra.*

In *Stanford Daily v. Zurcher,* 64 FRD 680 (N.D. Cal. 1974), the plaintiffs had a fee agreement that they would pay counsel "$5,000 plus whatever funds they could raise from interested third parties." *Id.* at 686. Pursuant to this fee contract counsel was paid $8,500. The Court awarded a total fee of $47,500. *Id.* at 688.

Similarly, in *Davis v. County of Los Angeles,* 8 EPD ¶ 9444 (C.D. Cal. 1974), plaintiffs were represented by the Los Angeles based Center For Law In The Public Interest (CLIPI), *amicus* herein. As a non-profit public interest law firm the Center's clients were not obligated to pay any fee to CLIPI. The Court held that the fact that CLIPI was such an organization was "not legally relevant." Had Congress intended for fees to be governed by fee agreements with counsel, it would not have cited with approval a case where an award of $60,000 was made to an organization with no right to contract for fees with a client.

In the final case cited by Congress, *Swann v. Charlotte-Mecklenberg Bd. of Education,* 66 FRD 483 (W.D. N.C. 1975), counsel for the plaintiffs were reimbursed out-of-pocket expenses and some nominal compensation by the NAACP Legal Defense and Educational Fund, Inc. *Id.* at 486. The Court held these fee arrangements were irrelevant, noting that "in other civil rights cases where counsel fees have been awarded, the courts have held that reasonable fees should be granted regardless of whether the individual plaintiffs were obligated to pay any fees. . . ." *Id.*

If Congress had desired a percentage or dollar amount "cap" on civil rights attorney's fees, it could have included it as it has done in numerous other fees statutes.[5] The absence of such a provision further demonstrates that "reasonable" statutory fees are intended to differ from fees that are the products of traditional percentage fee agreements.

[5] *See, e.g.,* 28 U.S.C. 2412(d)(1)(A) [fee awards under EAJA limited to $75/hour in absence of special circumstances); Federal Tort Claims Act, 28 U.S.C. § 2678 [fee limited to 20% of administrative settlement; 25% of judgment or settlement]; Social Security Act, 42 U.S.C. § 406(a) [fee limited to 25% of award]; Indian Claims Commission Act, 25 U.S.C. § 70 (1976) (10% of recovery).

B. Using A Fee Contract As A Limit On Statutory Fees Frustrates Congress' Purpose Of Encouraging Attorneys To Accept Meritorious Civil Rights Cases

The use of a contingent fee agreement as a cap on fees does not comport with the aim of the civil rights fee shifting statutes, which seek to provide an incentive for attorneys to represent clients with meritorious civil rights actions.[6] This fundamental Congressional purpose has been repeatedly recognized by this Court.[7]

Allowing a percentage recovery to serve as a "cap" on a statutory fee award would decrease the already limited number of attorneys willing to represent civil rights plaintiffs.[8] Because civil rights cases frequently involve primarily injunctive, non-monetary relief[9], and frequently involve limited damages recovery[10] a contractual contingent fee cap severely limits the

[6] *See generally* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1, *reprinted in* U.S. Code Cong. & Ad. News 1976, 5908.

[7] *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976)."); *Blum v. Stenson,* 465 U.S. 886, 897 (1984) ("The legislative history [of § 1988] explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.' S. Rep. No. 94-1011, p. 6 (1976)."); *City of Riverside v. Rivera,* 477 U.S. 561, 576 (1986) ("Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.")

[8] *See generally* Comment, *Attorney's Fees in Civil Rights Cases: Contingent Fee Awards Under Section 1988,* 17 Pac. L.J. 1275 (1986).

[9] *See Rivera, supra,* 477 U.S. at 575 ("because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases . . . to depend on obtaining substantial monetary relief. Rather, Congress made it clear that it 'intended that the amount of fees . . *not be reduced because the rights involved may be non-pecuniary in nature.*' " (quoting S. Rep. No. 94-1011, p. 6 (1976) (emphasis added by Supreme Court)

[10] In addition to the special problems and defenses in civil rights actions against public entities noted in *Rivera,* it should be emphasized that civil rights recoveries are statutorily limited, such as under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, where neither emotional distress nor punitive damages may be recovered.

attorney's fee award, as illustrated by the instant case where counsel was awarded only $4,000 in fees even though he won the case after a jury trial. The existing difficulty of finding counsel to accept civil rights cases is well documented in the case law.[11] Limiting attorneys to the cap created by a private contractual agreement would discourage representation of the poor, who can only obtain private counsel on a contingent fee basis.

Thus, members of this Court have correctly noted on numerous occasions that private sector fee agreements or percentage recoveries are inappropriate standards for calculation of civil rights attorney's fees awards.[12] Indeed, in enacting § 1988, Congress specifically noted that civil rights cases are not competitive in the legal marketplace, stating "the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *City of Riverside v. Rivera,* 477 U.S. 561, 576 (1986) (citing House Report at 3). A fee agreement with a civil rights client, who is typically unable to afford legal services, addresses the attorney's relationship with the client, not the attorney's market expectation. The contingent fee contract with the client does not replace the court's determination of a "reasonable" fee because the court's award is based on a determination made after a victory on the merits. The court's award of reasonable

[11] For example in *Bradshaw v. United States District Court,* 742 F.2d 515 (9th Cir. 1984) (Bradshaw III), the district court strove for over 13 months to find an attorney to represent plaintiff. "Chief among the reasons given by attorneys and organizations contacted was the lack of compensation. Besides the obvious demand on attorney time for the adequate prosecution of a complex employment discrimination case, the costs of discovery were thought prohibitive." *Id.* at 516.

[12] *See City of Riverside v. Rivera,* 477 U.S. 561, 578 n.9 (1986) ("while private market considerations are not irrelevant, Congress clearly rejected the notion that attorney's fees under § 1988 should be based on private sector fee agreements."); *Blum v. Stenson,* 465 U.S. 886, 900 n.16 (1984) (rejecting suggestion that civil rights fee awards be calculated on a percentage of recovery basis, as in "common fund doctrine" cases); *Pennsylvania v. Delaware Valley Citizens' Council,* 483 U.S. _____, 107 S.Ct. 3078, 3089-3090 (1987) (O'Connor, J. concurring) (private market percentage of recovery model provides "very little guidance"); *Id.* at 3099 (Blackmun, J., dissenting) ("There is no reason to grant a defendant a 'windfall' by excusing payment of attorney's fees simply because a plaintiff has entered into a contingent fee contract.")

fees utilizes hindsight and can account for factors unexpected at the outset of a case such as a change in law or the unusually vigorous defense of a case. The reasoning in this Court's opinions in *Rivera, Blum* and *Delaware Valley II,* the unambiguous legislative history, and the congressional purpose in enacting the fee shifting statutes require reversal of the opinion by the Fifth Circuit below.

C. Use of the Terms of a Fee Contract as a Cap on Statutory Fees Would Yield Capricious and Inconsistent Results

Use of a contractual fee agreement as a "cap" would result in inconsistent and capricious fee awards in civil rights cases. For example, two different attorneys could perform the same work on the same case but because one attorney had a 30% fee agreement and another had a 20% fee agreement they would receive different amounts, thus potentially producing a "windfall" to the defendant who violated the civil rights laws.

Or, if the client received only injunctive relief—as occurred in each of the three cases[13] where Congress found the courts had "properly applied" the § 1988 fee factors—use of a contingent fee agreement could produce *no* statutory fee award.

Such arbitrary standards for fee awards would discourage attorneys from accepting civil rights cases[14] and would violate Congress' directive to provide a "reasonable" fee.

D. Remaining Issues Regarding Contingent Fee Contracts Should Be Left For The States To Regulate In The First Instance

Any remaining issues regarding contingent fee contracts should be resolved in the first instance by state or local regulatory authorities. A considerable regulatory system exists nationwide and includes state statutory provisions, state con-

[13] *Swann, Davis* and *Stanford Daily* were cases where only injunctive relief was recovered.

[14] *See* Comment, *Attorney's Fees Awards in Civil Rights Cases: Contingent Fee Awards Under Section 1988,* 17 Pac. L.J. 1272 (1986).

tract law and state disciplinary bodies.[15] This includes the ABA Model Rules of Professional Conduct, Rule 1.5 ("Fees") (1983), the ABA Model Code of Professional Responsibility DR 1-106 ("Fees for Legal Services") (1981), and state rules of professional conduct, such as California's Business and Professions Code, § 6000 *et seq.*, and the California State Bar Rules of Professional Responsibility. In addition, numerous local agencies such as state and county bar associations have fee arbitration panels which routinely regulate attorney-client fee disputes.[16]

II. CONSISTENCY WITH MARKETPLACE STANDARDS REPEATEDLY APPROVED BY THIS COURT REQUIRES COMPENSATION FOR LAW CLERK AND PARALEGAL TIME

The Fifth Circuit's opinion in this case did not expressly address compensation for paralegal and law clerk hours, but simply held such hours were not compensable due to the contingent fee contract. *Blanchard v. Bergeron,* 831 F.2d 563, 564 (5th Cir. 1987). Thus it is unnecessary for the Court to

[15] *See generally Mandatory Arbitration of Attorney-Client Fee Disputes: A Concept Whose Time Has Come,* 14 Toledo L.Rev. 1205 (1983).

[16] *Id.* at 1226 n. 104. These include:

Alaska Bar R. 35-42; Rules of Comm. of the State Bar of Ariz. on Arbitration of Fee Disputes; By-Laws of the Legal Fee Arbitration Comm. of the Bar Ass'n of Greater Cleveland and the Rules and Regulations of its Legal Fee Arbitration Bd.; Rules for Arbitration for Legal Disputes, Conn. Bar Ass'n; Rules of the Fee Dispute Comm. of the Dallas Bar Ass'n; Model Fee Arbitration Bylaws, as adopted by the Fla. Bar Ass'n; State Bar of Ga.'s Fee Arbitration R.; Rules of the Idaho State Bar on Arbitration of Fee Disputes; Rules for the Arbitration Comm., as approved by the Iowa State Bar; Mich. Gen. CT. R. 979; Legal Fee Arbitration Plan, as adopted by the Ky. Bar Ass'n; Resolution of Fee Disputes, N.H. Bar Ass'n; N.J. Ct. R. 1:20A; Section 739, By-Laws of the Philadelphia Bar Ass'n Rules to the Fee Dispute Comm. of the Philadelphia Bar Ass'n; Procedures of the Legal Fee Arbitration Bd. of the Minn. State Bar; Rules of the Comm. on Resolution of Fee Disputes, the Bar Ass'n of Metropolitan St. Louis; Fee Arbitration Rules, as adopted by the State Bar of Wis.; Cal. Bus. & Prof. Code § 6200 *et. seq.;* Rules of Procedure for the Hearing of Fee Arbitration by the Alameda County Bar Ass'n; Rules for Arbitration Proceedings for Attorney Fee Disputes, Beverly Hills Bar Ass'n; Rules for Conduct of Fee Disputes and Other Related Matters, Los Angeles County Bar Ass'n; Rules of Conduct of Fee Arbitrations by the Fee Arbitration Comm. of the Santa Clara County Bar Ass'n; San Diego County Bar Ass'n Rules of the Arbitration Comm.

examine the paralegal and law clerk issue. If, however, the Court considers this question, *amici* urge that compensation for such hours be awarded.

The "reasonable attorney's fee" awards mandated by such Civil Rights statutes as 42 U.S.C. § 1988 would be inadequate and inconsistent with standards in the legal marketplace if they did not compensate for time spent by paralegals and law clerks. The policy of enabling plaintiffs' counsel to conduct civil rights litigation in the most efficient and economical fashion would be frustrated if statutory fees did not compensate for paralegal and law clerk hours.

A. Courts and Lawyers Routinely Include Compensation For Paralegal and Law Clerk Time in Attorney's Fees Awards

The current practice in the legal marketplace, followed in court awards of attorneys' fees, is to provide compensation for work performed by paralegals and law clerks.[17] Congress, in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, cited with approval *Davis v. County of Los Angeles,* 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), as one of the cases in which the factors for calculating an attorney's fees award were "correctly applied." S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913. *Davis* has been repeatedly cited with approval by this Court. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 431 (1983); *Blum v. Stenson,* 465 U.S. 886, 893-4; *City of Riverside v. Rivera,* 477 U.S. 561 (1986).

In *Davis,* plaintiffs sought compensation for "967 hours of statistical analysis, legal research, transcript summarization, interviewing, and general assistance carried out by a law clerk

[17] *See, e.g., Cameo Convalescent Center, Inc. v. Senn,* 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985); *Alter Financial Corp. v. Citizens & Southern Int'l Bank,* 817 F.2d 349 (5th Cir. 1987) (awarding paralegal and law clerk time under Fed. R. App. P. 38 for frivolous appeal); *Lamphere v. Brown University,* 610 F.2d 46 (1st Cir. 1979); *Aumiller v. University of Delaware,* 455 F. Supp. 676 (D. Del.), *aff'd mem.* 594 F.2d 854 (3d Cir. 1979); *Chisholm v. United States Postal Service,* 516 F. Supp. 810 (W.D.N.C.), *aff'd in part, vacated in part on other grounds,* 665 F.2d 482 (4th Cir. 1981); *Suzuki v. Yuen,* 678 F.2d 761 (9th Cir. 1982).

and a paralegal assistant." *Id.* at p. 5048 All requested paralegal and law clerk hours were compensated. *Id.* Similarly, this Court affirmed an award under § 1988 which included compensation for 84.5 law clerk hours. *Rivera, supra,* 477 U.S. at 565. This Court cited with approval market evidence on law clerk billing, noting the district court's finding that " 'the rate of $25 per hour . . . [for] law clerks, was lower than the customary hourly rate for such services.' " *Id.,* at 566 n.2.

Awards for time spent by paralegals and law clerks are also required if civil rights attorneys' fees awards are to be consistent with the billing practices in the private marketplace. The use of the prevailing marketplace as the critical standard in calculating awards of attorney's fees has been repeatedly emphasized by this Court. *See, e.g., Blum v. Stenson, supra; Pennsylvania v. Delaware Valley Citizens' Council,* 483 U.S. ____, 107 S.Ct. 3078, 3089 (1987) (O'Connor, J. concurring).[18] In *Blum,* this Court explicitly rejected the proposition that attorneys should be billed on a "cost" or "cost-plus" basis and held that a reasonable fee is to be determined by fees charged in the prevailing legal market. The published opinions in the area of discovery in attorney's fees cases demonstrate that paralegal and law clerk hours are billed on an hourly basis in the legal marketplace.[19] And, in adopting a new Bankruptcy Code in 1978, 11 U.S.C. § 330, Congress specifically noted the practice in the legal marketplace of billing for paralegal hours. The House Report states, "In nonbankruptcy areas, attorneys

[18] Because *Delaware Valley II* was decided by a split Court, Justice O'Connor's concurrence should be treated as the opinion of the Court. *See Marks v. United States,* 430 U.S. 188, 193 (1977) (in the absence of a majority opinion, the opinion which provides the narrowest rationale for the Supreme Court's decision constitutes the Court's holding in the case); *see also Thompson v. Kennickell,* 836 F.2d 616 (D.C. Cir. 1988) (treating O'Connor concurrence as controlling opinion in *Delaware Valley II); Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987), *cert. denied,* ____U.S.____, 108 S.Ct. 752 (1988); *Catlett v. Missouri Highway and Transportation Committee,* 828 F.2d 1260 (8th Cir. 1987), *cert. denied,* ____U.S.____, 108 S.Ct. 1574 (1988).

[19] *See, e.g., Real v. Continental Group,* 653 F. Supp. 736 (N.D. Cal. 1987) (finding that most law firms in the San Francisco Bay Area charge $65 per hour for paralegals); *Ruiz v. Estelle,* 553 F. Supp. 567, 589 (S.D. Tex. 1982) (noting that defendants paid their private counsel $35 per hour for paralegal work).

are able to charge for a paraprofessional's time on an hourly basis, and not include it in overhead. If a similar practice does not pertain in bankruptcy cases then the attorney will be less inclined to use paraprofessionals even where the work involved could easily be handled by an attorney's assistant." H.R. Rep. No. 95-595, 95 Cong., 1st Sess., p. 329, 330 (1977).

B. The Policy of Encouraging Efficient and Economical Staffing of Civil Rights Cases Is Furthered By Allowing Compensation for Paralegal and Law Clerk Time

The policy concerns expressed by Congress in the Bankruptcy Act are fully applicable to the attorney's fees provisions of the Civil Rights Acts. As recognized by the 7th Circuit, the use of paralegals "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying the civil rights statutes."[20]

Permitting civil rights attorneys to bill for the use of paralegals and law clerks on the same basis as the legal marketplace encourages their use. If civil rights attorneys could not be compensated for paralegals and law clerks on an hourly rate basis, two results would occur: (1) civil rights attorneys would be discouraged from using paralegals and would tend to use associate attorneys, at higher billing rates, to do work which could be performed by paralegals and law clerks at lesser rates; and, (2) civil rights attorneys would actually lose money on the use of paralegals and law clerks because they would not recover interest on the overhead costs of paralegals and law clerks. The effect would be a dual bar in the civil rights field: attorneys who defend civil rights cases would continue to bill for paralegals and law clerks at market hourly rates while plaintiff civil rights attorneys would be discouraged from using them. There is no support in the legislative history to support such a dual-standard bar and no reason to create it.[21]

[20] *Cameo Convalescent Center, Inc. v. Senn,* 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985).

[21] Compensation for law clerk hours also furthers Congress' goal of providing representation for civil rights clients. *See* Comment, *Court Awarded Attorneys' Fees in Recognition of Student Lawyering,* 130 U. Pa L. Rev. 161 (1981).

CONCLUSION

Limiting statutory fees by private contracts would mean that the very cases where fees are most critical—cases involving poor clients or violations of civil rights where little or no monetary recovery is likely—would go unprosecuted. This result is inconsistent with Congress' intent in providing fee shifting provisions and could yield inconsistent and capricious fee awards.

Civil rights and public interest attorneys, such as *amici,* should be encouraged and allowed to staff cases in an efficient and economical manner by using paralegals and law clerks. Reasonable compensation for law clerk and paralegal time is consistent with the practices in the legal marketplace and is supportive of cost effective case management.

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